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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 73-242

THOMAS L. THAGGARD, SR., et al.,
Petitioner

versus

UNITED STATES OF AMERICA,
Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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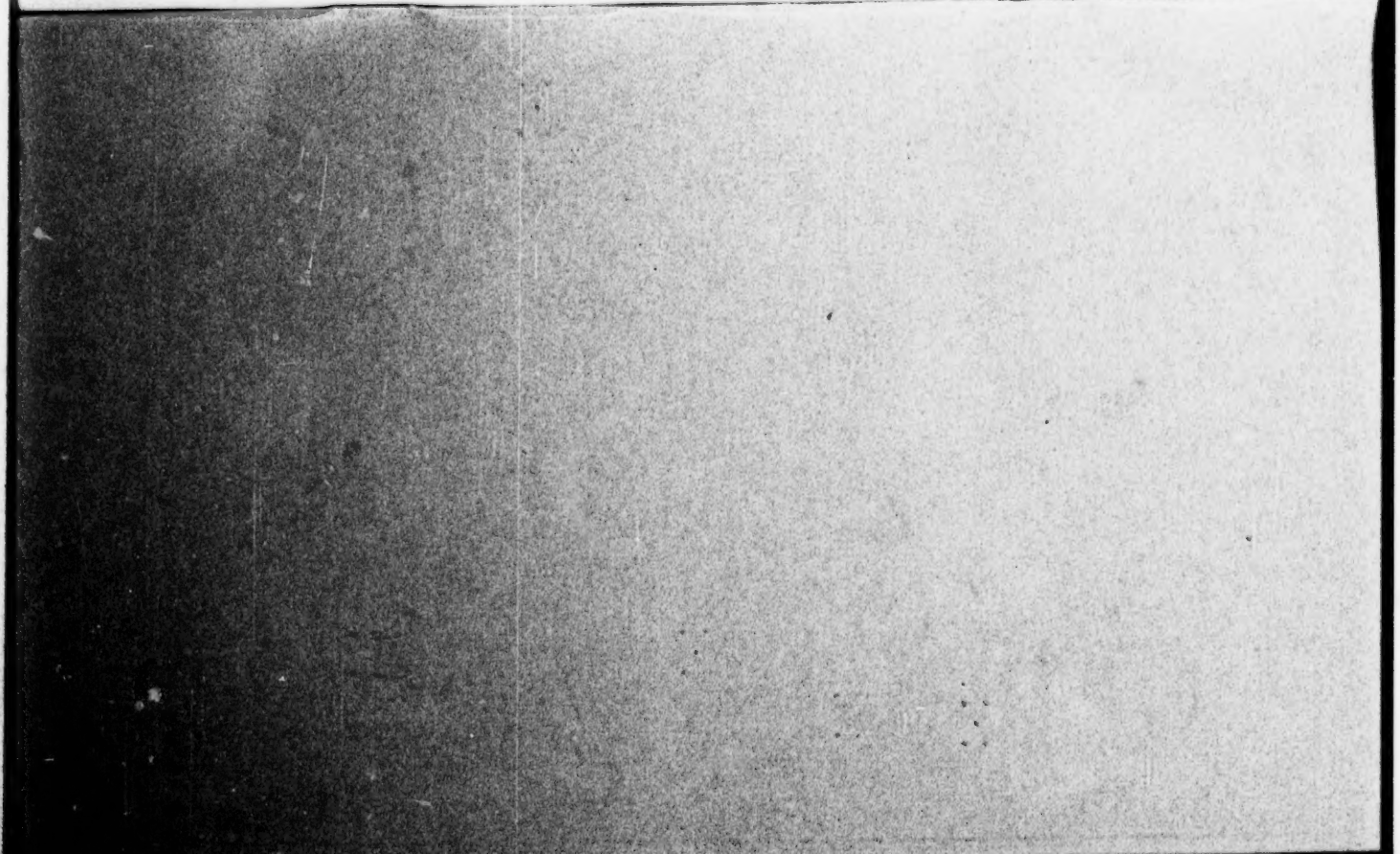
August, 1973



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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, THOMAS L. THAGGARD, SR., respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on the 16th day of April, 1973 which affirmed the conviction of Petitioner rendered by the United States District Court for the Middle District of Alabama.

Application for rehearing was made to the Fifth Circuit Court of Appeals and was denied on June 8, 1973.

**Motion to extend the time for filing of petition for Writ of Certiorari to this Court was made and order was made by this Court extending the time for filing to and including August 7, 1973.**

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears in Appendix A.

The opinion denying petition for rehearing appears in Appendix B.

## JURISDICTION

This Court has jurisdiction and authority to review the decision of the United States Court of Appeals for the Fifth Circuit by authority of Rule 19(b), Revised Rules as last amended on October 12, 1970 of the Supreme Court of the United States.

## QUESTIONS PRESENTED

### I.

Whether the testimony as to the amount of the fee paid to Petitioner's attorneys prejudiced the jury against Petitioner and thereby denied him the effective assistance of counsel.

### II.

Whether the challenged statute, 18 U.S.C.A. 1955 (84 Stat. 937) wherein there is contained a provision designated as Sub-paragraph E which described the prohibited, criminal conduct expecting any bingo, lottery or any similar game of chance conducted by an organization exempt from tax under Paragraph (3) of Sub-section (c) of Section 501 of the **Internal Revenue Code of 1954**, as amended, amounts to an invidious and unconstitutional discrimination against Petitioner.

### III.

Whether 18 U.S.C.A. 1955 has been unconstitutionally applied to the facts in this case.

IV.

**Whether the challenged statutes violate the provisions of the First Amendment which prohibits any law respecting an establishment of religion.**

V.

Whether the Federal Government has any power to regulate activities which are wholly intrastate in nature.

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

I.

**Constitution of the United States, Amendment I:**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

II.

**Constitution of the United States, Amendment XIV:**

> Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III.

**Title 28, Section 1955, United States Code:**

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section–
>
> (1) "illegal gambling business" means a gambling business which–
>
> . . .

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

IV.

**Title 28, Section 1511, United States Code:**

(a) It shall be unlawful for two or more persons to conspire to obstruct the enforcement of the criminal laws of the state or political subdivision thereof, with the intent to facilitate an illegal gambling business. . . .

V.

**Internal Revenue Code of 1954, § 501:** . . .

(c) List of exempt organizations.–The following organizations are referred to in subsection (a): . . .

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefits of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office. . . .

## STATEMENT OF THE CASE

This case originated by way of indictment of this Petitioner, the same being returned by the U.S. Grand Jury on May 3, 1972. (Tr. of Rec. page 1) This indictment contained four counts and named as defendants numerous persons including Appellants Pregno and Vanzie Beasley. (Tr. of Rec. page 1)

Count I of said indictment charged this Petitioner, together with others, with willfully and knowingly combining and conspiring and agreeing together with each other and with cer-

tain other persons named as co-conspirators, to operate a gambling business in violation of the laws of the State of Alabama involving five or more persons and according to various other terms set out therein, all in violation of 18 U.S.C.A. 1955.

Count II of the Indictment charged this Petitioner, together with others named therein, with conspiring and agreeing to obstruct the enforcement of the criminal laws of the State of Alabama pertaining to gambling in order to further an illegal gambling operation by corrupting certain named public officials, including the sheriff and District Attorney of Crenshaw County, Alabama, all in violation of 18 U.S.C.A. 1511. (Tr. of Rec. page 4)

The Government elected not to proceed to try the matters contained in Counts III and IV of the indictment, thereby leaving only the first two counts, above described, to be considered by the Court for the purposes of trial of this cause. (Tr. of Rec. page 83)

The Petitioner, Thomas L. Thaggard, Sr., on the 19th day of June, 1972, entered a plea of not guilty to all counts in the indictment and subsequently, with leave of Court, filed various motions preliminary to the trial of this cause and listed as follows:

A. Motion to Transfer (Tr. of Rec. page 25)

B. Motion to Dismiss the Indictment (Tr. of Rec. page 28)

C. Motion for a Continuance. (Tr. of Rec. page 62)

All of the motions were denied by the Trial Court by way of written orders. (Tr. of Rec. page 74)

Numerous other motions were filed by the various defendants, including the Petitioner herein, which motions are not significant to the appeal of this cause, but were in the nature of: Motion for Production of Statements of Co-conspirators; Motion to Require Election of Counts; Motion for a Bill of Particulars; and a Motion for Severance and Separate Trial. It should be noted that certain portions of the request for a Bill of Particulars was granted by the Trial Court and the right to inspect certain documentary evidence was also allowed by the Trial Court.

Thereafter, on the day set for trial, namely the 19th day of June, 1972, Petitioner's counsel renewed his motion for a con-

tinuance on the grounds of increased and continued notoriety by the newspapers and communication media relative to the trial of the case, which motion was overruled by the Trial Court. (Tr. of Rec. page 167)

Thereafter, a jury was selected (Tr. of Rec. pages 4-160) and trial of the cause was had from June 19 through June 22, 1972. (Tr. of Rec. page 134) The jury returned a verdict of guilty as charged in Counts I and II of the indictment against this Petitioner. (Tr. of Rec. page 939) Thereafter, this Petitioner was sentenced to three years in the custody of the Attorney General of the United States by the Honorable Frank M. Johnson, Jr., the Trial Judge in this cause. (Tr. of Rec. page 88)

Petitioner is presently out on bond and has appealed the judgment of the U.S. District Court for the Middle District of Alabama and the U.S. Court of Appeals for the Fifth Circuit where his prior conviction was affirmed on April 16, 1973. Petition for rehearing was timely filed and denied without opinion on the 18th day of June, 1973.

## ARGUMENT IN SUPPORT OF GRANTING WRIT

### I.

Petitioner's argument rests on the premise that appellate courts can and indeed must perform the function of insuring a fair trial free from the pernicious effects of error. Certainly, it is not possible for the appellate judge to **know** the influence of error on the trier of fact, but that does not mean that a judge cannot evaluate the probabilities of the influence of error.

Petitioner is unwilling to equate "correct result" with "justice" as did the United States Court of Appeals for the Fifth Circuit when it said:

> ". . . We have no doubt that under ordinary circumstances this maneuver was both improper and prejudicial and would warrant a reversal.
>
> "Nevertheless, upon mature reflection and cool analysis we are left with an abiding conviction that the guilt of the defendants in this case was so irrefutably evident that even in an errorless trial an acquittal would have been an incredible event."

The appropriate test which should be followed is set out in **Fahy v. Connecticut**, 375 U.S. 85 (1963), wherein the Court adhered to the test established in **Chapman v. California**, 386 U.S. 18 (1967). There the Court states the test in terms of "whether there is a **reasonable possibility** that the evidence complained of might have contributed to the conviction." See also **Kothekos v. U.S.**, 328 U.S. 750 (1945). That case fashions the rigorous requirement that an error can be considered harmless only if the Court is convinced BEYOND A REASONABLE DOUBT of its harmlessness.

The fact that the Court below found the error ordinarily reversible is indicative that they were not convinced beyond a reasonable doubt of its harmlessness. There was a reasonable possibility that the erroneously admitted evidence had substantial and injurious effect and influence in determining the jury's verdict.

Petitioner asks this Court to focus on the degree of probability that error influenced the judgment, and put aside personal belief in the soundness of the result. As a judge well knows, to err is human but to err is not always harmless. To tolerate as harmless the error above referred to which clearly had the effect of denying Petitioner the right to effective counsel amounts to a violent obstruction to the substantial rights of Petitioner, as well as a perversion of justice and of the judicial system. See **Coplon v. U.S.**, 191 F.2d 794, Cert. denied, 72 S.Ct. 363.

II.

18 U.S.C.A. 1955, Section E provides that this section shall not apply to any bingo game, lottery or similar game of chance conducted by an organization exempt from tax under Paragraph 3 of Subsection C of Section 501 of the **Internal Revenue Code of 1954**, as amended and thereby creates an invidious classification which is repugnant to the Equal Protection Clause of the Fourteenth Amendment.

The statute in question makes exempt from prosecution "corporations, and any Community Chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes," which is to say that individual citizens may not gamble, but churches and charitable foundations may. Who is to say that gambling does not cause a substantial detrimental effect on our society?

Why would exclusion of eleemosynary corporations and organizations from the criminal statute applying to gambling be less corrupting than the laws applicable to individuals? This unreasonable classification has the effect of complete elimination of individual gambling on the one hand and total encouragement indirectly of certain individuals on the other hand. Technically, charitable and other eleemosynary organizations within the State of Alabama can be prosecuted for violation of its criminal laws under state law yet they would be exempt from prosecution by the Federal Government since they fall within the above noted exception. The Petitioner Thaggard admittedly violated state statutes in operating the Crenshaw gambling house yet a nearby church which raffled or conducted a lottery for a prize was also guilty of a criminal violation but not subject to federal sanctions. Thus, 18 U.S.C.A. 1955 creates an unconscionable and unreasonable distinction subjecting some citizens to criminal prosecution while exempting others for no apparent valid reason.

## III.

Even if 18 U.S.C.A. is held to be constitutional, as applied to the facts in this case it is unconstitutional.

The clear intent and meaning of this act was that it would not apply to a small, token amateur gambler such as Petitioner was when operating a gambling establishment known as "Cotton's Place" in Crenshaw County, Alabama. The legislative history of the statute indicates the clear intention of Congress to make a statutory attack only upon syndicated gambling and organized crime. Petitioner's operation had no interstate ramifications or connections whatsoever. Petitioner earnestly insists that he should not have been tried under this statute for the above stated reasons.

## IV.

Petitioner contends that the challenged statutes, 18 U.S.C.A. 1955 and 1511, violate the provisions of the First Amendment which prohibits any "law respecting an establishment of religion." The pivotal question is: Is it constitutional for the Federal Government to allow religious organizations to gamble, and yet deny the same privileges to its private citizens?

A logical interpretation of the challenged statutes is that churches may gamble, but private citizens may not. Yet, this Court has held that government power is not to be used to favor religious organizations. **Everson v. Board of Education**, 330 U.S. 1 (1946). How can the Federal Government extend benefits to religious organizations and yet deny those benefits to its private citizens? This cannot consistently be done in light of the "establishment" clause of the First Amendment. If the Federal Government is going to extend certain privileges, then this should be done without regard to religious affiliation **vel non**.

In the words of Jefferson, the clause against establishment of religion was intended to erect "a wall of separation between church and state." The "establishment" clause has since been interpreted to mean that neither state not federal governing bodies may extend special privileges to a religious organization when the same privileges or benefits are not extended to a non-religious organization.

The statute in question, as already noted, does more than merely approach the verge of that limitation. The words of the late Mr. Justice Black in speaking to this issue should be remembered:

> "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. **We could not approve the slightest breach.**" **Everson v. Board of Education**, 330 U.S. 1, 18 (1946).

Measured by these standards, there is no way to circumvent the conclusion that the First Amendment has been here violated.

## V.

The answer as pertains to 18 U.S.C.A. 1955 is clearly no, and therefore 18 U.S.C.A. 1955 is unconstitutional as to the placement of regulations on activities that are wholly intrastate in nature. The mere fact that Congress has determined for itself when a particular activity shall be deemed to affect commerce does not preclude further examination by the Supreme Court of the United States. The activities that are beyond the reach of Congress under the commerce power are those which are completely within a particular state which do not affect other states, and with which it is not necessary to interfere for the purpose of

executing some of the general powers of government. **Katzenbach v. McClung**, 379 U.S. 294, 13 L.Ed.2d 290, 85 S.Ct. 377 (1965). In effect, Thomas Thaggard's gambling in a rural Alabama county had so microscopic an effect on interstate commerce, if it had any effect at all, that it cannot be held to have encroached upon interstate commerce.

In this Republic, there is a dual system of government, national and state. Each within its domain is supreme, and one of the chief functions of the United States Supreme Court is to preserve the balance between them, protecting each in the powers it possesses, and preventing a trespass thereon upon the other. In re: Heff 197 U.S. 488, 49 L.Ed. 848, 25 S.Ct. 506 (1905). Under the Federal Constitution, the two governments, national and state, are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers. **South Carolina v. United States**, 199 U.S. 437, 50 L.Ed. 261, 26 S.Ct. 110 (1906), **South Covington and Cincinnati Railway Company v. Kentucky**, 252 U.S. 395 (1920). The power of a state to protect the lives, health and the property of its citizens and to preserve good order and the public morals was not surrendered to the general government nor restricted directly by the Constitution and it is essentially exclusive. **United States v. E. C. Knight**, 156 U.S. 1, 39 L.Ed. 325, 15 S.Ct. 249 (1919).

## CONCLUSION

Petitioner submits this case should be reversed on the basis of the reasons hereinabove set out.

There are substantial constitutional questions submitted which should be fully briefed and decided.

Respectfully submitted,

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August, 1973

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